ELEANOR H. WOOD

IBLA 76-422 Decided April 8, 1980

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application AA-8262.

Set aside and remanded.

1. Alaska: Native Allotments -- Hearings -- Rules of Practice: Hearings

A Native allotment application filed pursuant to the Alaska Native Allotment Act of 1906 must be rejected if it was not pending before the Department of the Interior on Dec. 18, 1971. Where there are factual questions concerning the pendency of an application they can best be resolved at a hearing pursuant to a Government contest.

2. Alaska: Native Allotments -- Contests and Protests: Generally -- Rules of Practice: Government Contests -- Rules of Practice: Hearings

A Native allotment applicant who is a minor is not precluded from establishing use and occupancy of the land applied for. However, such use and occupancy must be achieved as an independent citizen in his own right and must be potentially exclusive. The question of a 14-year old's independent use and occupancy is best addressed at a contest proceeding.

APPEARANCES: James H. Holloway, Esq., and James Grandjean, Esq., Alaska Legal Services Corp., Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Eleanor H. Wood appeals from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated December 10, 1975, rejecting her Native allotment application AA-8262. 1/ The application was filed pursuant to the Alaska Native Allotment Act, 34 Stat. 197, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed subject to pending applications, section 18(a), Alaska Native Claims Settlement Act, 85 Stat. 710, 43 U.S.C. § 1617 (1976)), and implementing regulations at 43 CFR Subpart 2561. 2/

On November 30, 1972, the Bureau of Indian Affairs (BIA), filed a Native allotment application with BLM on behalf of Eleanor H. Wood. The application states that the parcel of land 3/ is used as a campsite to hunt, fish, and pick berries. The applicant claims substantial use and occupancy from 1957 to the present. The application was signed by Eleanor H. Wood and dated November 20, 1972. Roy Peratrovich, Superintendent, Anchorage Office, Bureau of Indian Affairs, certified that the applicant was entitled to an allotment. The certification is within the application and is dated November 27, 1972.

The Realty Officer, Anchorage Agency, BIA, wrote BLM on August 8, 1974, regarding Wood's application. The letter recognized that the application was dated November 20, 1972, and enclosed copies of correspondence, submitted as proof of receipt of Wood's application with that office prior to December 18, 1971. The correspondence referred to is an October 16, 1972, letter from Wood to BIA, and an October 24, 1972, response by Peratrovich. Wood's letter states:

> Regarding your letter of May 13, 1971 which I realize is quite a time back, I would like at this time to re-submit my Native Allotment Application. I am an Indian born and raised here. I have lived on this land, and have consistently used the land for hunting and berry picking each year. My parents and grandparents trapped and hunted there before me.

1/ By order of November 26, 1976, this case was consolidated under the rubric William C. Bouwens, et al., IBLA 75-663(b) et al. On further consideration we have determined that the case differs sufficiently to require a separate opinion.

2/ Action on this appeal was stayed pending rulings on the general subject matter of Native allotment applications from the United States Court of Appeals in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), and Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978).

3/ The parcel applied for is the SW 1/4 of sec. 15, T. 7 N., R. 11 W., Seward meridian.

People have gotten their land in the same area, so why can't I get mine? When I first received your letter in 1971 I decided I wasn't going to try to get the land, but since then people all around me are getting their land in the same area, so I feel I am entitled to my claim, and would like to complete my application.

Please forward to me any information I need to complete my application.

Peratrovich's reply states:

According to our records you sent in an application describing land that is included in a State selection application. A letter was sent to you May 13, 1971, explaining the land status and asking you to submit evidence of occupancy to prove that you started using the land before the State filed application and that you have continued use of the land each year up to the present time, but we heard nothing further from you.

If you can furnish this detailed information regarding use and occupancy, please complete the application forms and return to us. We will be very happy to complete and certify your application for filing with the Bureau of Land Management.

Enclosed are application forms and an envelope to return them to us.

On May 28, 1975, BLM notified Wood that no evidence was submitted to show that a completed application was filed prior to December 18, 1971. The letter correctly notes that an allotment application filed pursuant to the Act of 1906 must be rejected when it is not pending before the Department of Interior on December 18, 1971, the date of repeal of the Act. William Yurioff, 43 IBLA 14 (1979).

The letter continues by noting that the State of Alaska filed selection application A-050580 on November 17, 1959, which included the land in Wood's allotment application, and segregated the land from entry. Wood, born on October 17, 1945, was only 14 when the land was segregated. BLM concluded that Wood did not assert independent control and use of the land prior to the state selection; rather, her use and occupancy was as a minor child in company with her parents.

Wood was allowed 60 days to submit evidence that her application was filed prior to December 18, 1971, and that she was asserting independent control and use of the land at the age of 14.

By letter of June 10, 1975, BIA responded:

> Enclosed are copies of additional material, submitted as proof of receipt of Mrs. Wood's application prior to December 18, 1971.
>
> The signed rough draft of Mrs. Wood's application is dated November 20, 1970. The November 20, 1972 date on the typed application submitted to Bureau of Land Management was a typographical error.
>
> Mrs. Wood's name appears on a list of eleven applicants, who had filed on State selected land, in a May 25, 1971 letter from Realty Specialist Delores N. Roullier to Mr. George Miller of Kenai. In this letter Mrs. Roulier explained that applications for State selected and Moose Range lands would not be processed by this office until the applicants supplied detailed information to back up the assertion of a valid existing right.
>
> We hereby request that Mrs. Wood's application be directed for further processing.

The rough draft application mentioned above is a xerox of the back page of an application. The application is not certified by BIA.

The May 25, 1971, letter referred to above to George Miller states:

> Native allotment applications were received from many people in the Kenai area for lands that are not vacant unreserved Federal public domain; that is, land which has been patented, land selected by the State of Alaska and land withdrawn for the Moose Range. Therefore, it was necessary to return the applications to the people as shown on the enclosed list.
>
> An application for State selected land must contain the evidence of occupancy to prove a history of firm and consistent use of the land from a date prior to State selection continuous up to the present time. Also an application for land in the Moose range withdrawal must contain the evidence of occupancy to show a history of firm and consistent use of the land from a date prior to the withdrawal continuous up to the present time
>
> Applicants in both categories would have to be old enough to have been 21 years of age prior to the withdrawal of the land from public domain.

> All of the applicants who meet to [sic] above conditions for filing should return their applications with detailed information, signed statements or other data to back up the assertion of valid existing right. This is very important, because an application without the detailed history of use is usually rejected by Bureau of Land Management.
>
> I regret that it was necessary to return these applications, but we must comply with BLM regulations and meet the requirements thereby imposed.

It is likely Wood received her application returned by BIA to George Miller because of her October 16, 1972, letter to BIA where she stated: "In 1971 I decided I wasn't going to try to get the land."

By decision of December 10, 1975, BIA rejected Wood's allotment application. The stated reasons for rejection were the same as those mentioned in the May 28, 1975, BLM letter; i.e., failure to show that the application was timely filed and failure to show independent use and occupancy prior to the segregation of the land by the State of Alaska.

In addition to filing a notice of appeal and a statement of reasons for appeal, Wood has filed a request for a hearing and a motion to remand the application to BLM for equitable adjudication. Attached to the remand motion is an affidavit of Roy Peratrovich, dated January 7, 1976, which states in part:

> I have read Eleanor Wood's Native Allotment case file and the pertinent BIA correspondence materials relating to her allotment application in 1971. These materials reflect, to my satisfaction, the fact that Eleanor Wood had a valid application on file with the Bureau of Indian Affairs prior to the effective date of the Alaska Native Claims Settlement Act of December 18, 1971.

The following two issues are presented by this appeal: (1) Was Wood's Native allotment application pending before the Department of the Interior on December 18, 1971; (2) If the application was timely filed, has Wood shown independent use and occupancy of the land at the time of segregation.

[1] Section 18 of the Alaska Native Claims Settlement Act, 85 Stat. 710, 43 U.S.C. § 1617 (1976), repealed the Alaska Native Allotment Act, supra, with a proviso for the processing of applications "pending before the Department of the Interior on December 18, 1871." On October 18, 1973, the Assistant Secretary, Land and Water Resources, issued a memorandum which interpreted the phrase "pending before the Department of the Interior on December 18, 1971." He declared:

> This phrase is interpreted as meaning that an application for a Native allotment must have been on file in any bureau, division, or agency of the Department of the Interior on or before December 18, 1971. The Department has no authority to consider any application not filed with any bureau, division, or agency of the Department of the Interior on or before said date. Evidence of pendency before the Department of the Interior on or before December 18, 1971, shall be satisfied by any bureau, agency or division time stamp, the affidavit of any bureau, division or agency officer that he received said application on or before December 18, 1971, and may also include an affidavit executed by the area director of BIA stating that all applications transferred to BLM from BIA were filed with BIA on or before December 18, 1971.

As noted in the above memorandum, an affidavit, such as the one executed by Superintendent Peratrovich, is generally sufficient evidence of pendency of an application before the Department. However, in this instance, evidence suggests that the application signed on November 20, 1970, was returned to Wood, who decided not to complete the application. Wood apparently reconsidered her decision on October 16, 1972, when she wrote to BLM stating she would like to complete her application.

In order for Wood to have a valid application pending before the Department, the 1970 application must be deemed to have been on file with the Department as of the repeal of the Native Allotment Act on December 18, 1971, and the 1972 application must be considered as an amendment to the 1970 application. The application dated and signed in 1972 could not have been pending before the Department in 1971. 4/ Jessie Jim, 22 IBLA 54 (1974).

The Secretarial Instruction of October 18, 1973, regarding amendments to applications directs:

4/ In light of Wood's October 16, 1972, letter and BIA's October 24, 1972, response we give little, if any, credence to the BIA statement that the November 20, 1972, date on the application submitted to BLM was a typographical error. Moreover, the application which BIA tendered to show that appellant had an application on file prior to December 18, 1971, while dated November 20, 1970, also shows in category 5 that the use of the land was from calendar year 1957 to 1972. The year "1972" was partially scratched out and the phrase "to present" was inserted. What BIA has not attempted to explain was why an application purportedly signed in 1970 would show use up to 1972. We would like specific evidence on this point at the hearing.

> All amendments to allotment applications must be closely scrutinized. Amendments which result in the relocation of the allotment will not be accepted unless it appears that the original description arose from the inability to properly identify the site on protraction diagrams. Amendments which are designed to claim the commencement of the use and occupancy at an earlier point in time must also be carefully examined and the applicant must establish the reason for the error, his good faith in making the correction, and the applicant must present convincing evidence of the actual use and occupancy at the earlier point in time.

The file contains only a copy of the back page of the 1970 application. We are unable to determine if the land description in the 1970 application is the same, nor can it be determined from what date the land was occupied or the period of actual occupancy claimed.

The conflicting evidence contained in the file regarding the pendency of an application on or before December 18, 1971, raises factual issues.

In Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), the United States Court of Appeals for the Ninth Circuit ruled that where issues of material fact are in dispute, due process requires that the applicants

> must be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and, if they request, granted an opportunity for an oral hearing before the trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment.

Pence v. Kleppe, supra at 143.

Following that decision, the Board ruled that applying the Departmental contest procedures, 43 CFR 4.451-452 would satisfy the requirements of due process. Where a factual issue exists as to the applicant's compliance with the use and occupancy requirements of the Act,

> BLM must initiate a contest giving the applicant notice of the alleged deficiency in the application and an opportunity to appear at a hearing to present favorable evidence prior to rejection of the application. Donald Peters, 26 IBLA 235, 241-242, 83 I.D. 308 (1976), reaffirmed, Donald Peters (On Reconsideration), 28 IBLA 153, 83 I.D. 564 (1976).

John Moore, 40 IBLA 321, 324 (1979).

Recently, the court of appeals held that the Departmental contest procedures would satisfy, at least facially, the due process requirements set forth in Pence v. Kleppe, supra. Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978).

Because of the very peculiar circumstances in this case where questions arise concerning the pendency of the application despite assertions that an application was pending at the time of the repeal, the most appropriate procedure here is the institution of a Government contest where the facts can be resolved at a hearing.

The first issue to be resolved at the hearing will be the status of Wood's application on December 18, 1971. Thus, all questions bearing upon this issue should be examined. These include, but are not necessarily limited to, the following: Did Wood have a proper application filed with BIA in 1970; was there a copy or the original of that application with BIA on December 18, 1971; was the application returned to Wood or an appropriate agent of Wood prior to that date; did Wood have actual notice of BIA's action and abandon or effectually withdraw her application on or before December 18, 1971, or waive any right to object to BIA action before then; and is there any basis for concluding the application was constructively or actually pending before BIA on the crucial date? All witnesses should be mindful of their obligations under 18 U.S.C. § 1001 (1976) in presenting evidence bearing on the question of pendency.

If Wood is able to show that an application was pending in the Department on December 18, 1971, the 1972 application should be examined to determine if it qualifies as an amendment under the guidelines set forth above.

Assuming that the application is found to be timely filed, the question of Wood's independent use and occupancy of the land prior to state segregation should be addressed at the contest proceeding. BLM determined that Wood was 14 years old at the time the land was segregated by State of Alaska selection application A-050580, filed November 17, 1959. Based upon her age, BLM concluded "that the applicant did not assert independent control and use of the land prior to State selection."

[2] A minor is not precluded from establishing qualifying use and occupancy. However, such use and occupancy must be achieved as an independent citizen in his own right and it must be at least potentially exclusive. Sarah A. Pence, 43 IBLA 266, 269 (1979). The age of 14 is not so young that it can be determined as a matter of law that an applicant was not capable of asserting the necessary independent use and occupancy. See, e.g., Nellie Bosewell Beecraft, 41 IBLA 70 (1979).

Appellant must establish that at the age of 14 she was independently using and occupying the land. Appellant may produce evidence and testimony of favorable witnesses.

The State of Alaska has an interest in the land resulting from its conflicting selection application. Consequently, the State should be served with notice of Government contest proceedings and have an opportunity, upon filing of a proper motion, to intervene. State of Alaska, 41 IBLA 309 (1979).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded for further proceedings consistent with this decision.

Joan B. Thompson
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Anne Poindexter Lewis
Administrative Judge